

SEP 09 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETER T. HARRELL,

Plaintiff - Appellant,

v.

DARREL LEMOS; et al.,

Defendants - Appellees.

No. 07-15101

D.C. No. CV-05-00420-GEB

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Eastern District of California  
Garland E. Burrell, Chief Judge, Presiding

Submitted August 26, 2008<sup>\*\*</sup>

Before: SCHROEDER, KLEINFELD, and IKUTA, Circuit Judges.

Peter T. Harrell appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging that defendants violated his Fourth and Fourteenth Amendment rights when they arrested and searched him without

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<sup>\*</sup> This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

probable cause. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal based on *Heck v. Humphrey*, 512 U.S. 477 (1994). *Whitaker v. Garcetti*, 486 F.3d 572, 579 (9th Cir. 2007). We vacate.

We vacate the district court's dismissal of Harrell's action as *Heck*-barred. *See Wallace v. Kato*, 127 S. Ct. 1091, 1098 (2007) (instructing that civil proceedings should be stayed while related criminal charges are pending). Because the district court did not have the benefit of *Wallace* when it dismissed the action, we vacate the dismissal and remand for further proceedings consistent with that opinion.

Because we vacate we do not consider Harrell's other contentions.

**VACATED and REMANDED.**